No. 80-1684

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEAT, MARWICK, MITCHELL & Co.,
ANTHONY M. NATELLI and JOSEPH SCANSAROLI,
Petitioners,

v.

WACHOVIA BANK AND TRUST CO., N.A., MELLON BANK, N.A., FIRST WISCONSIN TRUST CO., THE DREYFUS OFFSHORE TRUST, N.V., and NATIONAL FIRE INSURANCE CO. OF HARTFORD,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This supplemental brief is filed by PMM pursuant to Rule 22.6 of the Rules of the Court to call attention to decisions of courts of appeals and of the Court not available at the time PMM filed its petition for a writ of certiorari which bear upon the questions presented.

1. *The "implied" remedy.* The courts of appeals continue to disregard Congressional intent and to formulate conflicting rules concerning liability under § 10(b) of the 1934 Act. Recent decisions from the Third and Fifth Circuits, and the continuing massive federal litigation which they evidence, emphasize the reasons for granting the writ and deciding the first question at this time.

In *Huddleston* v. *Herman & MacLean,* 640 F.2d 534 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit held

that a private cause of action may be implied under § 10(b) of the 1934 Act where the actions alleged "would also warrant a suit under Sections 11 and 12(2) of the 1933 Act. . . ." (640 F.2d at 541) The court observed that the issue had been posed and left open by this Court.

> "The apparent overlap in the applicability of the express liability provisions of the 1933 Act and the implied remedies raises the issue whether an implied cause of action is available when an express cause of action has been created, a question reserved by the Supreme Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 752 n.15, 95 S.Ct. 1917, 1933 n.15, 44 L. Ed.2d 539, 559 n.15 (1975), and again left open in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 211 n.31, 96 S.Ct. 1375, 1389 n.31, 47 L. Ed.2d 668, 687 n.31 (1976), in considering the relationship of Section 10(b) and Section 18 of the 1934 Act, 15 U.S.C. § 78r." (*Ibid.*)

The court said that this Court's decisions in *Blue Chip Stamps*, *Hochfelder*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), "give substance to the argument that no remedy should be implied for actions covered by express liability provisions of the statutes" (640 F.2d at 541-42 & n.6), but rejected that argument. The court did not once refer to Congressional intent, and said that it was "not being asked to create a new judicial remedy." (640 F.2d at 542)

The court in *Huddleston* went on to set out its view of the elements of a § 10(b) cause of action. In contrast to the decision of the court of appeals below that the § 10(b) remedy "presumes reliance if the omission is material or if the misstatement affects the price of the stock" (32a),

the court in *Huddleston* held "reliance is an issue in *all* Rule 10b-5 cases." (640 F.2d at 548) (emphasis in original) The court in *Huddleston* held that where as in this case against PMM the complaint "involve[s] alleged misstatements and omissions" in "published" financial statements, rather than defendants who "stand mute", proof of reliance is required. (*Ibid.*)*

Compare also the recent decision of the Court of Appeals for the Third Circuit in *Sharp* v. *Coopers & Lybrand*, No. 80-2229 (3d Cir. April 28, 1981), which adopts a third approach that presumes reliance "'where it is logical' to do so." (Slip op. at 24) In an action brought under § 10(b) against independent accountants based upon a published report the court held that there is no certain rule concerning proof of reliance, and expressly rejected the decision in *Huddleston* to "attempt to inject more certainty into the allocation of the burden of reliance." (Slip op. at 26 & n.19)

> "[T]he proper approach to the problem of reliance is to analyze the plaintiff's allegations, in light of the likely proof at trial, and determine the most reasonable placement of the burden of proof of reliance." (Slip op. at 26)

The court held that because of the "likelihood that investors would rely" in the circumstances of *Sharp*, reliance could be presumed. (Slip op. at 27)

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* Although it said the § 10(b) remedy is an "established remedy", the court also defined the scienter standard in a § 10(b) action which it said is "presently uncertain" in "this circuit", defined for the first time the burden of proof of scienter and defined due diligence and loss causation elements of the cause of action. (640 F.2d at 544-48) Like the court of appeals below, its analysis paid no attention to the elements of any of the express causes of action under the federal securities laws.

The lower federal courts continue to treat §§ 10(b) of the 1934 Act and 17(a) of the 1933 Act as immune from the constitutionally premised standards enunciated by the Court in its recent decisions concerning the existence and dimensions of "implied" private causes of action. If there is to be such immunity, that determination should be made by the Court.

The anomaly presented by the lower courts' treatment of §§ 10(b) and 17(a) is further underscored by the Court's recent decisions in *Complete Auto Transit, Inc.* v. *Reis*, 49 U.S.L.W. 4473 (U.S. May 4, 1981), *California* v. *Sierra Club*, 49 U.S.L.W. 4441 (U.S. April 28, 1981), *City of Milwaukee* v. *Illinois*, 49 U.S.L.W. 4445 (U.S. April 28, 1981), *Northwest Airlines, Inc.* v. *Transport Workers Union*, 49 U.S.L.W. 4383 (U.S. April 20, 1981), and *Universities Research Ass'n* v. *Coutu*, 49 U.S.L.W. 4354 (U.S. April 6, 1981), which reiterate that "the focus of the inquiry is on whether Congress intended to create a remedy," *California* v. *Sierra Club*, 49 U.S.L.W. at 4444.

In contrast to the decision of the court below that Congressional "silence" concerning "the judicial implication of a private remedy" validates that cause of action (36a), the Court in *California* v. *Sierra Club*, 49 U.S.L.W. at 4444 n.7, rejected "legislative silence" as a basis for ascertaining Congressional intent.

Similarly, the court below rejected "[t]he ancient maxim '*expressio unius est exclusio alterius*'" as a "dangerous road map with which to explore legislative intent." (27a) The Court, however, reiterated in *Northwest Airlines, Inc.*, 49 U.S.L.W. at 4389, that:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Accord, Universities Research Ass'n v. *Coutu,* 49 U.S.L.W. at 4359 & n.24. The court of appeals said that a § 10(b) remedy could be implied in favor of Wachovia Bank because that is "the only true relief available to them" (35a), whereas in *California* v. *Sierra Club,* 49 U.S.L.W. at 4444, the Court held:

> "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

Accord, City of Milwaukee v. *Illinois,* 49 U.S.L.W. at 4447:

> "Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938); *United States* v. *Hudson & Goodwin,* 11 U.S. (7 Cranch) 32 (1812). The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress."

2. *Retroactivity.* The decision of the court of appeals denying retroactive application to its ruling in *Forrestal Village* is in conflict with the recent decision of the Court of Appeals for the Second Circuit in *Holzsager* v. *The Valley Hospital,* No. 80-7839 (2d Cir. April 10, 1981). In *Holzsager* the court held that a judicial ruling is to be given retroactive effect under *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), even where the "decision reversed established law, so that [plaintiff] meets the first *Chevron* criterion. . . ." (Slip op. at 2499)

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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